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The complex tangle of the crime of genocide through individual and structural interpretations

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Abstract: After the invasion of Ukraine, the crime of genocide has become a hotly debated topic. The legal basis for charges rests on alleged acts of genocide, committed with the intent to destroy, according to the Genocide Convention itself. This crime is described and linked to the intent to destroy. Until now, the crime of genocide, through the case law of the International Court of Justice and the International Criminal Court, has been based on individual, imprecise, and impracticable interpretations. A crime and an act distinct from each individual perpetrator. The collective process also arises from structural conditions. The enormous intent of genocide and the capacity of individuals render the intentions of individual perpetrators speculative. Structural conditions make genocide difficult for courts because they must distinguish between individual intentions. *Ad hoc* criminal tribunals and the ICJ have produced limiting, inconsistent, and imprecise jurisprudence. Individual

interpretation has hindered prevention efforts, making it easy for states to readily deny genocide charges. The structural approach proposes and conceives genocide as a collective process within a structural context that demonstrates the intent of destruction. Consequently, this approach considers genocide independent of the internal mental states of individual perpetrators and of objective indicators of genocidal structures. A new definition and formulation of the crime of genocide is needed to streamline the judicial decision-making process, making it difficult for states to ignore genocide.

Keywords: crime of genocide; ICJ; ICC; ad hoc criminal tribunals; Ukraine; Israel; structural interpretation; individual interpretation; war crimes and crimes against humanity; international prevention; circumstantial evidence.

Introduction

The ongoing global crises of recent years demonstrate that the crime of genocide has played a central role internationally, sparking heated debate. Following the cases of Ukraine (Hill, 2022; Pollman, 2022; Van den Berg, 2023; Borger, 2023) and Israel and Hamas (Liakopoulos, 2022a; Lubet, 2023; Van den Berg, Chacar, 2023; Van den Berg, Deutsch, 2024; Liakopoulos, 2024a), the debate over who committed genocide has been

vigorously debated within the framework of a reassessment and redefinition of the objectives of genocide.

This redefinition is especially important for those who have denounced the accusations. The accusations have sparked controversy at a global level, with experts, politicians, and various forums, but with often inappropriate conclusions that create ongoing confusion.

Such a problem is primarily political, involving journalists and ordinary people who are unclear about the precise meaning of genocide, its history, and the relevant international jurisprudence, creating thus profound confusion among those who discuss this definition.

The notion of genocide include the distruction of race, tribe. It has been definitively interpreted by Raphael Lemkin (Lemkin, 1944) since the Second World War, when the Nazis took the lives of many Jewish families, thus paving the way for the Genocide Convention (Power, 2007). In December 1938, the UN General Assembly established and unanimously adopted the Convention on the Prevention and Punishment of the Crime of Genocide (Scalia, 2022; Beham, 2022).[1]

A convention that defined genocide as any of five enumerated acts committed with intent to destroy a person, a religious, or a racial group. The concepts of killing, causing serious bodily

1U.N. Convention on the Prevention and Punishment of the Crime of Genocide art. II., 9 December 1948, 78 U.N.T.S. 277.

harm, or causing serious mental harm include measures that prevent the emergence of conditions of life that would result in the physical destruction of the group in whole or in part.

It was the International Court of Justice (ICJ) that tried to interpret the Genocide Convention, as well as the International Court of Justice, the Tribunal of the former Yugoslavia (ICTY),[2] and the International Criminal Tribunal for Rwanda (ICTR) that adopted the definition of the Genocide Convention (Ambos, 2022).[3] What is of most interest is the intention to destroy and to consider the essential element of the crime that is difficult to prove (Quigley, 2006; Vest, 2007; Kirsch, 2009; Ambos, 2014; Behrens, 2015; Liakopoulos, 2024b).[4]

This difficulty is manifested in the jurisprudence of *ad hoc* criminal tribunals and the ICJ itself (Greenwalt, 1999; Neth, 2002; Nersessian, 2002; Jones, 2003; Ambos, 2009; Goldsmith, 2010; Aydin, 2014). It seeks to fill the lack of clarity and evidence to prove the intent to destroy, thus denying genocide as a crime and justifying the relative inertia coming from state and international fields (Power, 2007; Toosi, 2018; Buchwald, Keith, 2019).

2Security Council Resolution 827, Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993).

3Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90.

4Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgement, par. 695 (International Criminal Tribunal for the Former Yugoslavia 1 September 2004) (“intent to destroy” that “characterises the crime” (…)”.

The confusion of intent to destroy impedes the achievement of the Genocide Convention's objectives of punishment and prevention, as well as the legitimacy of genocide trials. It also impedes the ability of states to conform their behavior according to laws mandated by states and actors who recognize and address the atrocities of certain groups (Beham, 2022).

It is immediately apparent that the crime of genocide has encountered challenges at various international levels, particularly in international criminal law, thus ruling out the inapplicability of interpretations by *ad hoc* and national criminal courts. Prevention and atrocities complain of difficulties in obtaining evidence of acts of genocide, as well as ongoing events for states that use these difficulties to justify inaction (Scheffer, 2006; Zachary, Karazsia, 2018).

Rigour regarding the intent to destroy is difficult. The confusion surrounding the crime of genocide is fundamental. The prevailing understanding of genocide is that of an individual crime aimed at destruction.

Courts at all levels seek to differentiate, through interpretations, the intent to destroy and thus describe an individual's mental state, the *mens rea*, for the crime of genocide (Kress, 2006; Ambos, 2014; Kim, 2016; Liakopoulos, 2022b).[5] This is an

5Prosecutor v. Krstić, Case No. IT-98-33-T, Judgement, par. 549 (ICTY, 2 August 2001); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, par. 498 (2

individual position that reinforces the fact that the first international tribunals issued interpretative rulings that defined genocide, as well as those responsible according to the *ad hoc* tribunals and the individual perpetrators.

The ICJ issued definitive rulings according to the existence of state responsibility for genocide, which were issued against the former Yugoslavia. These rulings are also used by the ICTR towards an individual interpretation of the crime and in accordance with the international criminal law.

The problem is linked to inaccurate individual interpretations. Genocide cannot be considered as an act in itself, different, distant, and distinct from the commission of related acts by a single perpetrator.

Genocide is part of a collective process that arises from structural conditions (Semelin, 2005; Shaw, 2007; Kress, 2007; Schabas, 2009; Rosenberg, 2012; Feierstein, 2014).[6] Genocidal intent and the capacity of individuals make any determination to look at the intentions of individual perpetrators speculative.

Criminal courts are large and based on circumstantial evidence. The destructive intent of an individual defendant seeks to assess the real, potential motives of the accused who acts. The ICJ has ruled on questions of state responsibility. The challenge is to determine the intentions that motivate the state and those who

September 1998).

6Krstić, IT-98-33-T, par. 549.

ignore such acts.

Structural conditions influence people's desires, motivations, and goals, thus rendering genocidal activities unnecessary and less widely shared. Structures, including but not limited to acts of genocide, influence judges' decisions and the existence of an intention to destroy part of individuals. This is a misunderstanding that serves the objectives of the Genocide Convention, thus replacing an individual structural interpretation of genocide applied by states, actors, and punitive and preventive objectives.

The modification and definition of genocide is simply contained in the Genocide Convention and in the statutes that incorporate it, such as the Statute of the International Criminal Court (ICC), highlighting the political and practical obstacles, which are often even superfluous. This allows for various structural and individual interpretations.

The object and objective of the Genocide Convention is a structural interpretation that does not seem appropriate.[7] The intent to destroy is understood and attributed to a structural context that includes laws and practices for people operating at a specific time. The intent clause does not constitute an act of genocide. This position is directed at the activity of people towards specific objectives (Giddens, 1979; Bourdieu, 1990;

7Vienna Convention on the Law of Treaties, Art. 31, 23 May 1969, 1155 U.N.T.S. 331.

Sewell, 2005; Marion Young, 2011).

Genocide is understood as a collective process within a structural context that manifests the intent to destroy. The genocidal structure verifies acts of genocide that include killing and serious mental and physical harm. This is a structural position that finds confirmation in various categories of a repressive and ideological nature (Althusser, 2014).

The structural context of genocide includes repressive structures that have as their final objective the destruction of a protected group. Ideological structures have as their ultimate goal the dehumanization and violence against a specific group. It is obvious that within this framework, international criminal law proposes the application of a less rigorous standard based on knowledge, an assessment of the *mens rea* of genocide, and the intent to destroy *mens rea* (Greenawalt, 1999; Vest, 2007; Goldsmith, 2010).

Preventing any type of atrocity requires demonstrating the individual's mentality for events that suggest an intent to destroy, thus leaving criminal punishment unchanged (Scheffer, 2006; Karazsia, 2018). What is needed at this point is a rigorous and radical formulation of the definition of genocide, based on a structural framework capable of verifying acts of genocide.

The relative shift from the individual to the expanded framework of responses to genocide plays an important role in

the evolution and integration of criminal law and human rights (Drumbl, 2005; Ahmed, 2018; Engle, 2018; Guenther, 2020; Blum, 2023).

In reality, this process has been ongoing for years, with the ultimate goal of reducing and preventing atrocities (Donine, Solomon, Woocher, 2024), as well as the principle of responsibility to protect (R2P) to improve responses to mass atrocities disproportionately concentrated on military interventions (Wheeler, 2000; Scheffer, 2006; Badescu, 2007; Sarkin, Fowler, 2010; Motola, 2019).

The genocide framework is part of specific prevention standards that seek to curb and prevent the development of genocidal structures, while also contributing to structures that seek to arrest individual perpetrators of crimes and atrocities.

The structural approach shifts the focus from prevention to violent intervention that stops individual perpetrators from committing crimes that appear to be the only option (Hoover, 2012). Punishment and the potential structural approach are not designed to facilitate the punishment of genocide at the ICC.[8]

The issue of genocide is addressed by sufficient evidence to convict a single defendant who committed genocide, which thus defines the investigation under consideration. Convicting a single defendant means establishing the act of conscious intent

8Prosecutor v. Al Bashir, ICC-02/05-01/09-94, Second Decision on the Prosecution's Application for a Warrant of Arrest (12 July 2010).

to commit an act, a mental element that predefines, according to the ICC Statute, international genocide criminal proceedings.

The statute's definitions of knowledge and intent, as proposed by a structural interpretation, condemn and require the accused to be aware of acts within a structural context that thus demonstrates the intent to destroy. This structural interpretation includes the intent to destroy the framework of *mens rea*, which is ultimately eliminated from the investigation. This structural interpretation removes the requirement of *mens rea* for genocide convictions, as well as the intent to destroy and the *mens rea* that specifies the acts committed (Triffterer, 2001).[9] This is a moment of adopting a structural interpretation of genocide.

The ICJ has pending cases involving acts of genocide. In the cases of Gambia v. Myanmar, Ukraine v. Russia, and South Africa v. Israel, the allegations relate to the respondent state committing acts of genocide.

In the more recent cases of Nicaragua v. Germany and Sudan v. United Arab Emirates, it has been argued that the respondent state is about to commit acts of genocide (Liakopoulos, 2020a).[10] Through intervention requests in the cases against

9Triffterer affirmed that: "(…) mentioned subjective element is often called 'genocidal intent.' But this formulation is deceiving. It easily can be (…) understood as an overall expression of the complete subjective, the mental side of genocide. However, such an understanding is not only misleading but *contra legem*, insofar as there are two subjective elements required to establish criminal responsibility for genocide (…)".

10Application of Convention on Prevention and Punishment of Crime of Genocide in Gaza Strip (South Africa v. Israel), Provisional Measures, 2024 I.C.J.

Myanmar, Russia, and Israel, the countries demonstrate the position of the provisions of the Genocide Convention. The genocide interpretative framework helps states and actors identify structures of genocide as they develop, carefully assessing the intentions of individuals after mass violence has occurred.

Why is there such confusion about the concept of genocide, despite its own convention on the subject?

The Holocaust was an important milestone in the adoption of the Genocide Convention, a moment of hope for the international community to punish acts of this crime and those who committed other atrocities.

The violence against Bosnian Muslims in the former Yugoslavia, the Tutsis in Rwanda, and the Kurds in Iraq are examples that have long been of concern to international doctrine. States address genocide by arguing that the definition does not apply to their situation. Arguments regarding genocide indicate that it is a legal issue, highlighting the lack of evidence of intent (Power, 2007; Toosi, 2018).[11] It seems difficult to

Rep. 6 (26 January); Application of Convention on Prevention and Punishment of Crime of Genocide (Gambia v. Myanmar), Provisional Measures, 2020 I.C.J. Report 3 (23 January); Allegations of Genocide Under Convention on Prevention and Punishment of Crime of Genocide (Ukraine v. Russia), Provisional Measures, 2022 I.C.J. Report, 211 (16 March); Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory (Nicaragua v. Germany), Provisional Measures, 2024 I.C.J. Rep. 2 (30 April 2024).

11According to Power: "(…) attacks against Rohingya genocide, but only several

gather evidence for the intentions of perpetrators and the conditions of genocide (Scheffer, 2006; Karazsia, 2018).[12] Courts interpret the genocide definition to correct states' use of the provision and the intent to destroy. The relevant case law is varied and often confusing, making it easy for states to act in this way.

Issues related to genocide case law involve standards of proof for intent to destroy; the discretion exercised by courts in selecting the motives of potential perpetrators; relative reliance on circumstantial evidence; and the specification of matters that constitute an obligation to prevent. These are issues that strengthen states' efforts to prevent acts of genocide and undermine the legitimacy of an international legal regime aimed at regulating the prevention and punishment of genocide.

What are the standards of inconsistency?

The standards determining the elements of intent to destroy, in the definition of genocide, highlight a range of standards that

years after the events took place (…) has a very precise legal meaning" and that more information on the "intentions of those who are committing the crimes" was necessary (…)":

12Karazsia affirmed that: "(…) difficulty in proving intent, in real-time, has created a daunting task for the international community; therefore, this mandate limits the effectiveness of prevention strategies to retroactivity and not concurrent with exigent circumstances (…)". Scheffer declared that: "(…) early years of the administration, officials seemed incapable of definitive action unless and until genocide was determined to have occurred (…) the killing had subsided, or the larger responsibility any timely and effective response might trigger was too much to shoulder politically (…)".

determine the element of intent to destroy as well as the definition of genocide. This interpretation would define the goal-based approach, which seeks to interpret the intent to destroy as a precise element of intent or *dolus specialis* that calls for destruction and the alleged goal and goals of the perpetrator. In practice, the standards applied by the judgments vary.

The judgments emphasize that the perpetrator motivates the desire for destruction,[13] which he or she seeks precisely and clearly.[14] In such instances, the courts seek to limit and ask whether the accused has knowledge of the situation,[15] of the actions, and of the intentions of destruction (Kuper, 1985).[16]

The application of the courts and the standards are and appear to be inconsistent. As a result, the provision in this regard reflects the reasoning that is difficult to reconcile and the general

13Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgement, par. 108 (ICTY, 14 December 1999) ("(…) not been proved beyond all reasonable doubt that the accused was motivated by the *dolus specialis* of the crime of genocide (…)"). Prosecutor v. Krstić, Case No. IT-98-33-A, Judgement, par. 26–27 (ICTY, 19 April 2004): "(…) Trial Chamber rejected the Defence's argument that the killing of these men was motivated solely by the desire to eliminate them as a potential military threat (…) evidence further supports the Trial Chamber's conclusion that the extermination of these men was not driven solely by a military rationale (…) killing of the military aged men was, assuredly, a physical destruction, and given the scope of the killings the Trial Chamber could legitimately draw the inference that their extermination was motivated by a genocidal intent (…)".

14Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, par. 498 (2 September 1998): "(…) intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged (…)". Rutaganda v. Prosecutor, Case No. ICTR-96-3-A, Judgement, par. 524 (26 May 2003).

15Krstić, IT-98-33-A par. 134. Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgement, (27 January 2000).

16Prosecutor v. Krstić, Case No. IT-98-33-T, Judgement, par. 595 (ICTY, 2 August 2001); Akayesu, ICTR-96-4-T, par. 520.

statements of law that are contained in the cases themselves (Greenawalt, 2006; Kim, 2016).

Various and multiple motivations from the past

The causes of inconsistency and application of the destructive intent provision are varied and based on the discretion exercised by courts in selecting motives for perpetrators.

Especially in criminal trials for crimes of genocide, the court examines the apparent reasoning that the accused commits an act and follows orders, hatred of the group, aversion to the individual, power, the desire to see the group eliminated, the desire for integration, regardless of the combination that amounts to the intent of destruction (Pearlman, 1963; Arendt, 2003; Quigley, 2006).[17]

An initial position of thought in the ICTY trial in the Goran Jelisić case,[18] as well as in the 1961 Israeli trial of Nazi official Adolf Eichmann (Thomson, 1992; Arendt, 2006),[19] demonstrated the interpretations available to courts and the

17Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgement, par. 49 (ICTY, 5 July 2001); Niyitegeka v. Prosecutor, Case No. ICTR-96-14-A, Judgement, par. 53 (9 July 2004).

18Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgement, par. 1 (ICTY, 14 December 1999).

19Attorney General of the Government of Israel v. Eichmann, 36 I.L.R. 18 (DC Jer 1961), aff'd 36 I.L.R. 277 (Israel 1962): "(…) Counts one through four of his indictment were for "crimes against the Jewish people," which were defined under Israeli law using nearly identical language to that of the Genocide Convention. Compare § 1(b), Nazis and Nazi Collaborators (Punishment) Law, 5710–1950, 4 LSI 154 (1950) (Israel), with Genocide Convention (…)".

assessment of possible motives. These are two cases that differ from each other both in terms of the venue, namely a national and international court, and in terms of the law applied, namely crimes against the Jewish people under Israeli law and the crime of genocide under the ICTY statute.

The objective of this position is to demonstrate the truth and the interpretations available to judges, which are evident from the various possible motivations. Specifically, in the Jelisić case, the accused admitted to and killed Bosnian Muslims at the police station in connection with Luka's detention in Bosnia in 1992.[20]

In particular, the ICTY's first-instance trial chamber declared crimes against humanity and violations of the laws and customs of war without acquitting the accused of genocide. In the Jelisić case, various anti-Muslim sentiments were expressed, defining the Muslims' desire for purification, thus declaring that the prisoners were not a small percentage of survivors and that they did not have the requisite intent of genocide.[21]

The first trial chamber highlighted the issue of disturbed personalities, as well as the prisoners' pleasure in having the power of life and death, such as habits related to blood, pride regarding the number of victims, and the desire to terrorize them. The first trial chamber held that reasonable doubt had not

20Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgement, par. 1 (ICTY, 14 December 1999), par. 108.

21Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgement, par. 1 (ICTY, 14 December 1999), par. 102-103.

been established for the defendant based on the motivation of *dolus specialis* for the crime of genocide.[22]

In the Jelisić case, the defendant did not have the intent for genocide despite displaying a certain sadism, as we encountered in the Eichmann case. The Israeli court of first instance rejected Eichmann's claims because he was an anti-Semite and carried out extermination orders.[23] Perhaps he was a monster, a sadist driven by perversions who obviously denied his guilt.

In the same case, the Appeal Chamber attempted to simplify the analysis of possible motivations and clarified that the accused had the intention of destruction to obtain economic, political, and power benefits.[24] At the same time, the ICTR highlighted cases where the accused had the intention of destroying a group.[25] The courts have provided a rule that determines the motivations prevailing over genocide. States also file cases in the ICJ claiming that another state committed genocide while facing an insane mental state.[26]

The intention to destroy a state seems very complicated, especially given the multiple motivations that lead individuals to

22Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgement, par. 1 (ICTY, 14 December 1999), par. 104-105.

23Attorney General of Government of Israel v. Eichmann, 36 I.L.R. 18, par. 180 (DC Jer 1961), aff'd 36 I.L.R. 277 (Israel 1962).

24Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgement, par. 49 (ICTY, 5 July 2001).

25Prosecutor v. Niyitegeka, Case No. ICTR-96-14-A, Judgement, par. 53 (9 July 2004).

26ILC, Report on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 supp. n.10, at 44 (2001).

genocide. A head of state authorizes a military campaign, knowing it could result in thousands of deaths among members of a minority ethnic group. The head of state harbors no resentment toward a group, contributing public support to his campaign. A military unit includes soldiers with diverse objectives who violate and kill the inhabitants of a village, a stigmatized group.

This violence directed against a person considered an enemy. Excessive violence serves different purposes depending on the severity of the genocide charge, which hinders the intentions of a state and its individual.

Case law appears to be restrictive in cases of genocide (Fidahić, 2021).[27] The ICJ has recognized the distinction between the intent to destroy and the motives the perpetrator may have had,[28] suggesting the existence of reasoning, motivations that preclude the conclusion of an intent to destroy as if it were absent.

27See in argument from the ICJ, Application of Convention on Prevention and Punishment of Crime of Genocide (Bosnia & Hereggovina. v. Serbia & Montenegro), Judgment, 2007 I.C.J. Report 43 (26 February); Application of Convention on Prevention and Punishment of Crime of Genocide (Croatia v. Serbia), Judgment, 2015 I.C.J. Report 3 (3 February). Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (28 May); Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (8 July); Legality of Use of Force (Yugoslavia v. U.S.), Provisional Measures, 1999 I.C.J. 916 (2 June); Armed Activities on Territory of Congo, 2006 I.C.J. Report 6. (3 February); Questions relating to Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, 2012 I.C.J. Report, 422 (20 July).

28Bosnia & Herzegovina v. Serbia & Montenegro, 2007 I.C.J. Report, Par. 187-189.

In the Bosnia and Herzegovina v. Serbia and Montenegro case, the court suggested that the evidence sought to create a larger Serbian state.[29]

In Croatia v. Serbia, the court highlighted motivations relating to the creation of a homogeneous, ethnic Serbian state to punish the civilian population to support the conclusion of an intent to destroy, which was not the only inference of a precise reasoning to be drawn.[30] The ICJ has failed to clarify the confusion for criminal jurisprudence, thus determining grounds for genocide and evidence of motive. The question seems difficult to sort out the motivations of individuals who attribute state responsibility as finding an answer (Liakopoulos, 2020b).

Reliance on circumstantial evidence

Circumstantial evidence lacking a precise connection is part of the practice of international tribunals. It has contributed to the inconsistencies in case law regarding intent to destroy.

For example, in the Jelisić case, the Appeals Chamber considered a significant set of circumstantial evidence, such as a general context for the perpetration of other acts against the same group, the extent of atrocities committed, and the systematic targeting of victims based on their membership in a particular group and the repetition of other destructive acts of a

29Bosnia & Herzegovina v. Serbia & Montenegro, 2007 I.C.J. Report, Par. 372.
30Croatia v. Serbia, 2015 I.C.J. Report, Parr. 426-429.

discriminatory nature.[31]

These categories of evidence have few personal objectives, motivations, or desires for a defendant. For example, the Akayesu case judgment in the ICTR concerning the conviction for genocide by an international tribunal underlines the irrelevance of the intention of the individual accused who infers the intention for genocide within a general context of other acts that are perpetrated in a systematic manner against the same group regardless of whether the acts are committed by the same perpetrator and/or by others.[32]

The courts indicate the existence of a plan that is independent of the fact that the accused conceived and presented as evidence the intention to destroy.[33] The reasons have the requirement of intention to destroy which leads to inconsistencies due to the lack of clarity in genocide jurisprudence.

Lack of guidance regarding prevention obligations

The ICJ's jurisprudence was very limited in its guidance on this matter. The ICJ's rulings to date on genocide have affirmed the obligation of prevention.[34] The court held that states acted to

31Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgement, par. 48 (ICTY, 5 July 2001).

32Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, par. 728 (2 September 1998).

33Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgement, par. 276 (21 May 1999); Jelisić, IT-95-10-A, par. 48.

34Bosnia & Herzegovina v. Serbia & Montenegro, 2007 I.C.J. Report, par. 167; Croatia v. Serbia, 2015 I.C.J. Report Par. 128.

prevent genocide when the state became aware of the existence of a risk of genocide being committed.[35]

The obligation to prevent genocide is verified only when the commission of genocide begins. According to the court, this intention had as its objective the obligation to prevent, attempt, impede, and verify the act in question. The issue of multiple motivations was, for the court, a standard for destruction that seems high and reasonable,[36] without any other guidance on the situations that satisfied it. The court's process ensured that it had not issued a decision regarding prevention obligations for years and that verifying atrocities reduced the ability to comply with obligations.

In the case of Bosnia, provisional measures were requested against the former Yugoslavia in 1993 (Pistan, 2024).[37] Mass killings and expulsions of Bosnian Muslims had been ongoing for two years before the Srebrenica massacre. The ICJ concluded that genocide had occurred in this regard. The court's final decision regarding the genocide that had occurred in Srebrenica in 1995 was not issued until 2007.

The systematic executions, expulsions, and bombing attacks appeared indiscriminate and thus provided evidence of an ongoing genocide. In the case of Croatia, the genocide was slow

35Bosnia & Herzegovina v. Serbia & Montenegro, 2007 I.C.J. Report, par. 431.

36Croatia v. Serbia, 2015 I.C.J. Report, par. 428.

37Bosnia & Herzegovina v. Serbia & Montenegro, 2007 I.C.J. Report, parr. 1, 467-470.

and began in 1999. The final judgment was issued in 2015.[38] In Gambia v. In Myanmar in 2019, the court issued provisional measures with a general approach in 2020.[39]

In the other genocide cases, concerning the situations in Gaza and Ukraine, the court issued precise and rapid provisional measures.[40] Several years passed before a final decision was made.[41] The ICJ established that a situation of genocide had occurred, thus finding a violation of the obligation to prevent. The court had the opportunity to apply the standard of prevention, which depends on proof of the perpetrator's destructive intent.

Toward an unreliable individual interpretation. Destructive intent and internal mental state

Genocide jurisprudence identifies and includes symptoms of a fundamental problem related to the individual interpretation of genocide. Individual interpretation, demonstrated and approved by the courts, is the basis of the problems that have prevented

38Croatia v. Serbia, 2015 I.C.J. Report, 3.

39Application of Convention on Prevention and Punishment of Crime of Genocide (Gambia v. Myanmar), Provisional Measures, 2020 I.C.J. Rep. 3 (23 January).

40Allegations of Genocide Under Convention on Prevention and Punishment of Crime of Genocide (Ukraine v. Russia), Provisional Measures, 2022 I.C.J. Rep. 211 (16 March); Application of Convention on Prevention and Punishment of Crime of Genocide in Gaza Strip (South Africa v. Israel), Provisional Measures, 2024 I.C.J. Report, 2 (24 January).

41Ukraine v. Russia, 2022 I.C.J. Rep. 211; South Africa v. Israel, 2024 I.C.J. Report, 2.

the achievement of the Convention's prevention and punishment objectives.

The gaps regarding the Holocaust and the 1961 Jerusalem trial of Nazi official Adolf Eichmann have prompted reactions. The trial held in the national court did not include the charge of genocide and delivered a sentence based on provisions of the Genocide Convention (Schabas, 2013; Ozoràkovà, 2022).[42]

The charges relate to crimes against the Jewish people are defined in Israeli law identically to those of the Genocide Convention.[43]The Eichmann trial seemed an odd choice linked to events such as the Holocaust, considering the intent of genocide. The characteristics were selective reasoning (Rohlfing, 2012).

The length of the trial allowed for the relative development of various analyses for reports that integrate an extraordinary, extensive volume of testimonial and documentary evidence. The analysis of the trial and the litigation demonstrates and identifies an individual intent on destruction.

42Schabas affirmed that: "(…) Nuremberg tribunals held trials of Nazi officials involved in the perpetration of genocide, none of the defendants were charged with genocide (they took place prior to the adoption of the Genocide Convention), nor any equivalent crime (…)".

43See for example: § 1(b), Nazis and Nazi Collaborators (Punishment) Law, 5710–1950, 4 LSI 154 (1950) (Isr.).

Individual crime, mental state of an act of genocide, and intent to destroy. The role of the ICTY and the ICTR

Genocide, according to an individual interpretation, is an individual crime that empowers the accused to accuse and condemn. The *mens rea* of the crime is the intent to destroy, and the *actus reus* also includes other listed acts. This basic concept is evident in the jurisprudence of the ad hoc tribunals and the ICJ. Criticisms of the interpretation of the Genocide Convention continue to presuppose the intent to destroy.

The crime of genocide, through an individual interpretation, is developed by *ad hoc* courts that have examined cases for individual defendants who have been charged with complicity in acts of genocide and other punishable crimes. The *ad hoc* courts and the intent to destroy define the *mens rea* of the crime of genocide.[44]

Specifically, we are referring to the form of precise intent and/or *dolus specialis*,[45] which requires the defendant to act with the objective and purpose of destroying all or part of the group. Court interpretations vary and presuppose the destructive intent as part of the mind of individual perpetrators. References to the defendants' motivations are part of criminal jurisprudence,[46] as

44Prosecutor v. Karadžić, Case No. IT-95-5-R61, IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, par. 549 (ICTY, 11 July 1996).

45Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgement, par. 48 (ICTY, 14 December 1999).

46Jelisić, IT-95-10-T; Prosecutor v. Krstić, Case No. IT-98-33-T, Judgement, par.

well as the irrelevance of motivations and certain types of intent. The courts include the defendant and the information regarding the mental state that indicates to the courts the indirect evidence needed to prove the intent to destroy.[47]

The crime of genocide and the ICJ

The ICJ has addressed disputes regarding the crime of genocide, demonstrating support for an individualistic interpretation of genocide and establishing the responsibility of the state that committed and failed to prevent genocide. Decisions on genocide have been issued in two cases, both against the former Yugoslavia, and in the case of Bosnia v. Croatia (Liakopoulos, 2020c).[48]

Specifically, in the Bosnia case, the ICJ referred to the intent to destroy as an important requirement, which was not definitively established and related to events other than Srebrenica. Thus, it emphasized that none of those convicted of such crimes and events could have acted with a specific intent, that is, with *dolus specialis*.[49] The ICJ emphasized the need to distinguish between

549 (ICTY, 2 August 2001); Prosecutor v Kupreškić, Case No. IT-95-16-T, Judgment, (ICTY, 14 January 2000).

47Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, Judgement, par. 40 (7 July 2006); Prosecutor v. Kayishema, Case No. ICTR-95-1-A, Judgement par. 525 (1 June 2001); Rutaganda v. Prosecutor, Case No. ICTR-96-3-A, Judgement, par. 525 (26 May 2003).

48Bosnia & Herz. v. Serbia & Montenegro, 2007 I.C.J. Report, 43; Croatia v. Serbia, 2015 I.C.J. Report 3.

49Bosnia & Herz. v. Serbia & Montenegro, 2007 I.C.J. Report, Par. 277.

the intent to destroy and the reasoning of motives the perpetrator may have had.[50]

The discussion of preventive obligations for the ICJ and the states of the international community was a need to create a deterrent effect to reasonably prepare for genocide and to reinforce the idea that genocide is an individual crime and that the intention of destruction is something that lies in the mind of the individual, not of a state.

The term genocide describes attacks by Serb forces and Bosnian civilians during the 1992-1995 conflict. The ICJ highlighted that the 1995 massacre in Srebrenica violated the preventive obligations for genocide in relation to this event.[51]

Turning to some of the criticisms in this regard, we can say that the discussion of the individual conception of genocide, as well as the techniques that rely on interpretations relating to the intent to destroy, require the *mens rea* and the accused to be able to act with the aim of destroying part and/or all of the group. These are standards that propose and imply a basic level of knowledge according to which culpability for genocide extends individually and personally to a specific genocidal perpetrator who commits acts of genocide, while also encompassing the destructive consequences of one's actions and the survival of the

50Bosnia & Herzegovina v. Serbia & Montenegro, 2007 I.C.J. Report, Par. 189.

51Bosnia & Herzegovina v. Serbia & Montenegro, 2007 I.C.J. Report, par. 180, 431.

group as a victim in a matter relating to genocide.

On the other hand, the collective nature of genocide is based on any knowledge that provides the requirement for intent, which suggests constructive knowledge for a plan sufficient for genocide. Interpretations of an alternative nature and type cast doubt on the intent to destroy and the *mens rea* of the individual crime of genocide. Atrocities are continuous and take into account the intent to destroy. A different interpretation of the requirement is suggested, which is part of a burden of proof that abandons the legal definition of prevention.

The situation in the former Yugoslavia and Bosnia was the height of criticism and interpretation of the crime of genocide. As with the situation in Rwanda, the outbreaks of the period provided the legal basis for a greater protection mechanism from governments and international organizations. This system eliminated the requirement of intent and replaced it with that of just cause to justify any military intervention whenever extreme violence caused the deaths of unarmed civilians on a large scale in a region of the planet, thus holding the international community accountable. These positions also implied a unique interpretation of the legal definition of genocide, which remained valid for all purposes except prevention.

The question that now arises concerns the connection between the problem of the crime of genocide and its individual

interpretation. At this point, we must say that there are reasonable positions for an individual interpretation of genocide, which often appears to be mistaken and imprecise. For example, genocide emphasizes its recognition by the courts as a distinct act committed by a single perpetrator for a collective trial.

The intentions between a single perpetrator and the collective trial for genocide variably define the relationship between individuals and the structures embedded in the distinction of an individual intention. The structures influence prosecutors, judges, and the international community, as well as any other existence, recognized or not, that had to do with the intent of destruction.

Toward basic interpretations

A first basis for individual interpretation has to do with genocide, which is imprecise in nature. Genocide is seen as an act that is not discrete and committed by an individual, but rather as a collective process (Weitz, 2007). This process required a precise definition for genocide and also involved individuals who developed this approach over time.[52]

Genocide occurred under structural conditions reproduced in a large number of people through the verification of particular configurations and forms of situational factors, such as the

52Prosecutor v. Krstić, Case No. IT-98-33-T, Judgement, par. 549 (ICTY, 2 August 2001).

political and organizational entity of a state (Hamilton, 2016). The term “genocide”, as a continuing study by the international doctrinal community, follows the forms of a collective process, a coordination of diverse actions that lead to the destruction of essential foundations for the life of national and collective groups.

Genocide is a crime that seeks to punish and target another group in a paradigmatic manner. It is perpetrated by a state and another organized group, and is based on a widespread organizational complicity among members of the same society (May, 2005).

Recalling the Eichmann case once again, it is worth remembering that the crime of genocide is highly complex and brings with it various levels of confusion, making it difficult to specify and understand the modalities of its activity. Often, the execution of different acts depends on the number of victims, but also on the number of those who perpetrated the crime, as a measure of criminals who approach an actual and precise murderer of their victim.[53]

The Krstić case from the ICTY and from the chamber of the first instance is recalled, which highlighted and underlined the gravity, complexity, and scope of the crime of genocide as a prerequisite for the involvement of multiple actors, which imply

53Attorney General of Government of Israel v. Eichmann, 36 I.L.R. 18, par. 197 (DC Jer 1961), aff’d 36 I.L.R. 277 (Israel 1962).

and create a global, spherical conception of the commission of the crime.[54]The cases from the ICTY and the ICTR implicitly and strongly recognize the verification of genocide, which is based on a systematic methodology of acts and models of intentional actions,[55] and the scope of atrocities committed in a general context.[56] The collective nature of the crime of genocide is understood.

The court rulings and the related documentation worldwide, which support the understanding of the crime of genocide as a process that develops over time and is analyzed by various sciences outside of the legal science emphasize that genocide is not just an event of a destructive process but is often described as a process of evident elements in various phases followed. We must also pay attention to what is most important, that is, the role and work of each prosecutor at the global level, (Starr, 2007; Vanrooyen, Leaning, Johynson, 2008; Rosenberg, Silina, 2013; Van den Herik, 2014; Basso, 2016; Burleson, Giordano, 2016) describing that genocide does not aim to reduce other crimes to a war zone or not (Fein, 1997) and that this crime also contains a structural form (Wolfe, 2006) to a framework of atrocities that seem invisible (de Falco, 2022).

54Prosecutor v. Krstić, Case No. IT-98-33-T, Judgement, par. 549 (ICTY, 2 August 2001).

55Prosecutor v. Kayishema, Case No. ICTR-95-1-T, par. 93–94 (1 June 2001).

56Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, par. 523 (2 September 1998).

Every type of genocide passes through a spectacular violence, through logical or non-logical structures of possible layers of spectacular violence that develops over long or short periods. We recall the case of Rwanda and the number of people killed through continuous massacres that were not spontaneous but rather a consequence of racial ethnic divisions, a colonial era, a civil war, or propaganda that eliminated other factors from the overall situation in an area (Mamdani, 2001; Melson, 2003). We repeat that defining genocide as a collective act is linked to the hypothesis of a solitary type within a spectrum of interpretations that find space at its birth (Abtahi, Webb, 2008).[57]

A person who commits an act of genocide cannot always be alone, despite the empirical evidence that convictions have only been applied to one individual. This further raises the issue of understanding genocide as a collective act, a definition that needs to be expanded to make its international context work better. Situations that appear to involve a single individual are based on underlying conditions and the involvement of individuals.

57Abtahi, Webb affirmed that: "(…) a single human being will not, except in the most exceptional circumstances, be capable of destroying a protected group or a part thereof (…) normally impossible for a single perpetrator alone to destroy a group as such in whole or in part (...)". See also in argument: Prosecutor v. Krstić, Case No. IT-98- 33-T, Judgement, par. 549 (ICTY 2 August 2001): "(…) gravity and the scale of the crime of genocide ordinarily presume that several protagonists were involved in its perpetration (…)". Prosecutor v. Kayishema, Case No. ICTR-95-1-A, Judgement, par. 172 (1 June 2001): "(…) opinion on the "[t]he much-debated question whether genocide could be committed by a person acting alone (…)".

In the Jelisić case, the ICTY attempted to explore the possibility of mass murder by an individual who expressed anti-Muslim sentiments and the desire to purify the Bosnian Muslim population.[58]

In the first trial chamber of the ICTY, it was held that the individual genocidal perpetrator was practicing genocidal intent, committing widespread crimes supported by an organization. However, at the appellate level, judge Shahabuddeen, through his dissenting opinion, sought to convince the court that it was necessary to consider him acting alone.[59]

We must take into account that the crime was associated with military personnel, lawful for a court and reasonable for the conclusion in the field of a dimension that managed the defendant that he could not do anything else for a certain period of time without the approval of the higher authorities involved.

This passage shows that the situations each individual perpetrates are mostly related to violence. Models actually consider the genocidal individual to be alone but not to act alone. This is an individual who consciously intends to destroy a group, even with the help of nuclear weapons, for example by attempting to poison the pipes of a water supply (Luban, 2004; May, 2005).

58Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgement, parr. 102–03 (ICTY, 14 December 1999).

59Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgement, par. 16 (ICTY, 5 July 2001) (Shahabuddeen, J., dissenting opinion but in part).

The launch of a nuclear missile or the contamination of water supplies, under certain circumstances, even if carried out by a single person, also depends on the activity of others. The genocidal perpetrator thus wants to destroy the group and also influences the structural factors that make this objective desirable.

One's own actions are plausible and directed by a group as such, to the extent that each group is perceived as such. The perpetration is logical due to the involvement of other people. Individuals have also consciously developed nuclear weapons to carry out genocidal crimes. At this point, we can speak of a crime of collective genocide.

The attempt to reconcile individual acts and the destruction of the crime of genocide

In reality, from the case law used to date, we have not found precise definitions that define intentions of destruction, intentions as an internal or superior experience of intention, exploring thus the connection between intention and what should be done.

Intentions are identifiable and are reflected in thoughts, movements, and connections to previous situations, thus demonstrating intention understood as an internal mental state that commits itself to examining cases of genocide. However,

each defendant should have direct knowledge regarding the member state, including moments when they lie and make mistakes, not because they do not remember what they did, but because they consciously seek to confuse the relevant judicial authorities.[60]

The search for determining intent involves a certain level of ambiguity inferences based on indirect and circumstantial evidence. A gap exists between the accused's alleged acts and an expected outcome related to the hope of depriving others of protected rights.[61]

This gap becomes much wider when the acts committed by an individual destroy the group. It is independent of the fact that the alleged punishable acts involve the killing of people, as well as the coordination of operations every day at the field level, continuously bombing various areas, villages, etc. This gap relates to the main reasoning that courts use to demonstrate an individual's destructive intent.[62]

This gap also explains cases of genocide, as well as the varied motives that lead each individual to undertake activities that

60Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, Judgement, par. 40 (7 July 2006); Prosecutor v. Kayishema, Case No. ICTR-95-1-A, Judgement par. 525 (1 June 2001); Prosecutor v. Rutaganda, ICTR-96-3-A, Judgment, par. 525 (26 May 2003).

61Par. 223 of the Model Penal Code.

62Prosecutor v. Kayishema, Case No. ICTR-95-1-T, par. 276 (21 May 1999); Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgement, par. 48 (ICTY, 5 July 2001); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, par. 728 (2 September 1998).

contribute to genocide, based on specific, personal reasoning. The intention to destroy manifests itself in patterns of activity that are unique to individuals.

Structural impacts and connection difficulties. Unraveling acts from the skein of the genocidal criminal framework

The Intent to Destroy is a complex notion that involves many difficulties in defining the structures that often render genocide unbelievable, outside of the objectives of individuals and the structures themselves. These are patterns that are reproduced by people over time and enable other types of actions. These are relational patterns that are expressed through norms, informal practices, and formal institutional laws. These are frameworks of action that direct the activities of individuals toward objectives that are not shared—that is, frameworks that influence the intentions of individuals.

What interests us about the complex tangle of genocidal crimes is the ultimate goals of genocide. Genocidal structures are directed at activities that destroy a protected group in whole and/or in part, deviating from the intention of destruction as the ultimate goal of the individuals who practice it.

Nazi Germany immediately comes to mind, providing us with important insights into the capacity of the structures offered to pursue this path of destruction (Moses, 1998; Bloxham, 2008;

Pettitt, 2017).

In the Eichmann case, it was clear that the motives for the genocidal destruction were entirely orchestrated. The Eichmann case was mistaken about the details of the extermination of millions of people, which provided insights for successors and the constant challenges within an authoritative framework of situations that were able to be socialized with superiors.

The criticisms against Eichmann recall the *modus operandi* of the individual who wonderfully remembered what he ate at a dinner with the Nazis in 1934, but could not answer the number of Jews he attempted to put on his deportation trains (Lipstadt, 2011).

A Nazi regime in various incarnations channeled the desire for personal advancement through social recognition towards goals of spiritual, physical, and other elimination, offering a role that thus covered a well-organized bureaucracy to pursue its own goals, namely the destruction of many people. Channeling people's activities towards particular goals is evident, unlike the Eichmann case, which did not share such goals.

The ICTY and ICTR court transcripts were complete and full of guards and concentration camp officials doing their jobs. The Nazis were involved in the perpetration of the Holocaust, even though some of them were not entirely convinced of the “work done” because they did not believe in Nazism, the continuous

propaganda that acted consistently with an anti-Semitic ideology and more (Arendt, 2003).

The related structures channeled, as well as the activities of the people, towards opposing objectives. The structures were thus able to channel activities for the victims in the service of a final solution (Drumbl, 2016).

At the beginning of each deportation process, and especially in the Eichmann case, Nazi officials convinced members of the Jewish leadership to draw up lists of Jews to be deported. Jewish prisoners were forced to carry out killings for the disposal of bodies in the extermination camps (Drumbl, 2016).

The punishment of the Nazis and their collaboration in such crimes was linked to definitive convictions, which were used to prosecute Jews who collaborated and managed operations inside and outside the camps. Criminal trials thus sought to separate the enthusiastic collaborators who inflicted violence on a population from innocent victims, forced to carry out tasks of destruction and beyond.

The distinction between categories was not precise, and especially not among all the acts of the Holocaust. The process of recruiting the persecuted as agents and the destruction of a testimony to power was linked to the structures of genocide. Structures like those in Poland and Germany were effective in channeling and planning, achieving objectives independent of

who occupied a specific position.

The distinction of modern bureaucracies for their own trials assigns each individual a role dedicated to official orders to a specific person, whom any person can sacrifice and change any type of system pre-established by diseased minds.

Testimonies at international criminal trials, such as in the Eichmann case, by Jewish negotiators aimed to protect prisoners from the extermination of their property and probably not on a material basis that seeks to change things by arriving at statements that are interchangeable according to Eichmann and that he did not cause anyone else to do the things he did.

Mental states and their influence

When speaking of the influence of individuals' internal states on their own structures, we are referring to an individual approach that regards individuals' thoughts, intentions, and cognitions as a product of the structures within them. This is a similar point that asserts that structures are used within desires and intentions as a source of pleasure and pain and as a function that constitute their own structure (Haslanger, 2012).

The concept of people's subjectivity thus constitutes the ideological structures that operate in this regard (Quigley, 2006; Althusser, 2014)[63] as an indication of the concept of people's

63Althusser noted that: "(…) the actor internalizes the intent regarding the elements held by a structurally organized central formation, (...) if applicable with

subjectivity that constitutes the ideological structures that operate (Cesarani, 2006; Lipstadt, 2011; Stangneth, 2014). This is a good, profound example that places the objectives of ideological structures on a social and maniacal hatred of Jews, and on a fanatical and exaggerated anti-Semitism.

The Eichmanns' story, as well as their relationships with the Nazi Party and the SS from 1932 onwards, warns a convinced Nazi about the course of his career. Over time, it demonstrates the growth and responsibility of the Third Reich's propaganda. Nazi structures theoretically claimed otherwise.

Eichmann was skilled in his work dedicated to the extermination of the Jews. Eichmann possessed a unique ability to interpret the Nazis' plan. This testimony demonstrates the power of these structures to influence people's intentions and the mass killings of Tutsis in Rwanda, within a context where ethnic differences and propaganda at the time were based on dehumanizing the Tutsis and promoting the work of Hutus, allowing them to use weapons in their own communities.

Structures that influence decision-makers

Judges, state officials, and ordinary citizens have sought to form judgments regarding genocide in a manner that respects those living in society, as well as the alleged ongoing genocide.

respect to only a part of the group (...)". Quigley, BVerfG, 2 BvR 1290/99, par. 20, 12 December 2000).

Ordinary criminal trials and assessments of *mens rea* are also influenced by these biases (McKimmier, Masters, Masser, Schuller, Terry, 2013; Shen, 2017; Sorby, Kehn, 2021).

The flexibility of existing standards in genocide cases and implicit biases play a role in providing perfect proof for certain defendants and the evidence of intent to destroy. ICTY trials involving international crimes have suggested that Serbian defendants were disproportionately sentenced. There was no evidence on the part of the judges against Serbian defendants, therefore, mild biases are being put on the table. State officials' decisions were influenced by personal biases regarding the role of the bureaucracy and the perception of national interest.

The U.S. Department of State highlighted in 2016 that ISIS discussed and commented on the genocide against the Yazidis in Iraq, but without sufficient evidence regarding atrocities committed by the Myanmar military, as well as the genocide against the Rohingya (Liakopoulos, 2020d).[64]

Factors that led to the decision concerning the perception of American officials and the related geopolitical and economic interests of the US, were protected by maintaining relations with

64U.S. Department of State, Atrocities Prevention Report: Targeting of and Attacks on Members of Religious Groups in the Middle East and Burma (17 March 2016), https://2009-2017.state.gov/j/drl/rls/254807.htm. (Accessed on 24.09.2025). Antony J. Blinken, Sec'y State, U.S. Department of State, Secretary Antony J. Blinken on the Genocide and Crimes Against Humanity in Burma (21 March 2022), https://www.state.gov/secretary-antony-j-blinken-at-the-united-states-holocaust-memorial-museum/ Accessed on 24.09.2025.

Myanmar but not with ISIS. This reinforced the fact that the US, after six years, recognized the attacks against the Rohingya as genocide.

Prejudice made it easy for American officials to ignore and dismiss the accusations of genocide committed against Americans despite the continued massacres of high violence, assimilation policies, and other devastating practices (Morris, Maghakyan, 2021). Those who defended the European colonies believed they had no intention of destruction and sought enhanced civil liberties (Lewy, 2007), such as attempts to enforce genocide in the face of the horrors of slavery against the laws of Jom Crow.

The term “genocide” was a fictional attempt to suggest in the United States a plan to exterminate the Black population and to reassure white Americans by increasing the likelihood of the United States ratifying the convention.

American legislators mistakenly implied and supported claims opposing ratification of the genocide convention because of related concerns, which they used to criticize the Native American population and the violence and abuse of African Americans.

The same ideological structures made genocide possible. They influenced those who expressed judgments regarding genocide. This ideology affected Nazi Germany but also the countries that

resisted the extermination of their Jewish residents (Friedman, 1973).

Structural conditions made genocide untenable according to individual interpretation and as argued by international courts and scholarly doctrine. An individual interpretation produces jurisprudence inconsistent with the Convention's prevention objective. Such changes in interpretation were not sufficient. Understanding genocide takes into account and ignores the structural context it characterizes.

Toward a structural interpretation. The structural context of the intent to destroy

The intent to destroy is based on the amendment of Article II of the Genocide Convention and the statutes that adopted the Convention, thus improving and expanding individual interpretation of the intent to destroy.[65] This definition clarifies genocide and explicitly refers to a collective process of destruction that individuals seek to plan, instigate, or contribute to, and which cannot be committed alone.

This revision is formulated by the Genocide Convention. This is an alternative interpretation of the definition formulated by the Genocide Convention. It is an interpretation that genocide exists within an overall structural context that demonstrates the intent

65See Art. II of the Genocide Convention, XVI; art. 11 of Rome Statute, 121.

to destroy. This is verified by the listed acts of genocide that include killing, causing serious physical or mental harm, etc.

The structural interpretation of genocide distinguishes the collective process and its acts from the distinct actions of individuals who commit such a crime. The relationship between genocide and acts of genocide takes into account the characteristics of individual and collective acts (Kress, 2006).

Genocide, as a collective process, exists within a structural context that demonstrates the intent of destruction in one or more perpetrators who commit the acts of genocide. An act of genocide, as an individual act, exists when a perpetrator commits the listed acts within the context of genocide, that is, the collective process. It is thus a dialectical relationship between action and structure that is shown to be co-constitutive. Individual acts of genocide produce structures of genocide that transform individual acts into acts of genocide.

Structure contrasts with a prevalent and excessive individual approach is based on a relationship between individual agents and a structural context that influences them completely.

Criminal courts treat genocide as an individual crime, which implicitly recognizes the distinction between genocide and collective prosecution, as well as acts of genocide as individual actions. This recognition is also evident in the ICTR, which recognizes the genocide that took place in Rwanda as a matter of

common knowledge for the international community (Shannon, 2006; Mamiya, 2007; Kirsch, 2009; Faulkner, 2009).[66]

Each court independently considers the question of specific individuals who committed acts of genocide. Thus, the courts implicitly assess the existence of a genocidal plan and the participation of the accused in carrying out these acts.[67] This plan is conceived as a multifaceted individual involvement working collectively within a particular structural context.[68] This is similar to proposals that require proof and a plan for a genocidal policy, such as that included among the elements of crimes by the International Criminal Court (ICC) (Van der Wilt, 2006).[69]

These elements are different from those that leave the concept of the intent to destroy unchanged (Jones, 2003). The requirement

66Prosecutor v. Karemera, Case No. ICTR 98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, par. 35 (16 June 2006); Prosecutor v. Rwamakuba, Case No. ICTR98-44C-T, Judgement, par. 2, 210 (20 September 2006); Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-T, Judgement and Sentence, par. 16 (12 September 2006); Prosecutor v. Seromba, Case No. ICTR-2001-66-I, Judgement, par. 5, 340 (13 December 2006).

67Prosecutor v. Kayishema, Case No. ICTR-95-1-A, par. 525 (1 June 2001); Prosecutor v. Karadžić, Case No. IT-95-5-R61, IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, par. 94 (ICTY, 11 July 1996). Prosecutor v. Karemera, Case No. ICTR 98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, par. 21 (16 June 2006); Prosecutor v. Krstić, Case No. IT-98-33-A, Judgement, par. 225 (ICTY, 19 April 2004).

68Kayishema, ICTR-95-1-A; Karadžić, IT-95-5-R61, IT-95-18-R61.

69Preparatory Commission for the International Criminal Court, Report of the Preparatory Commission for the International Criminal Court, Add., Finalized Draft Text of the Elements of Crimes, U.N. Doc. PCNICC/2000/I/Add.2, 6-7 (2 November 2000). Van der Wilt affirmed that: "(…) specific intent element for genocide (…) ICJ's Croatia decision for indicating that a "pattern of conduct" was an independent additional requirement for a finding of state responsibility for genocide (…)".

of a political nature becomes an additional element that proves the imminent nature of genocide and how it occurred. The structural approach seeks to transform the concept of the intent to destroy, which increases the evidentiary burden on those who report acts of genocide.

Intention to destruct within a structural context

The intention to destroy differs from the intention of an overall structural context but not from the spirit of an individual's internal state of mind. A structural context includes structures that are overlapping and interconnected (Sewell, 2005).

The central position of structures enables and limits human behavior, as structures that are collectively orchestrated. Structure is expressed by necessary operations that achieve precisely collective goals (Giddens, 1979; Sewell, 2005).[70]

In some cases, organized structures and their explicit intention are articulated by a declaration of intent and by statements from individuals and positions of authority. The intention to destroy cannot be identified and based on patterns or principles that are observable from structures (Taylor, 1984).

70Giddens affirmed that: "(…) a structure can display an intent, I am not promoting the idea that the individuals embedded within them lack agency. Indeed, despite some characterizations of structure as precluding agency, the conception of structure I am utilizing here is one that "presuppose[s] (…)". Sewell affirmed that: "(…) agency not as opposed to, but as constituent of, structure". Structures and agency are mutually constitutive. Structures are built and maintained, produced and reproduced, by people exercising agency and their agency is in turn enabled and constrained by structures (…)".

Structural and collective intention

Structural intention and similar conceptions of collective intention are shared by the notion of intention that goes beyond the individual.

Genocidal intention usefully delineates several types of collective intention: intentions related to individuals; private intentions within a group context; individual sharing of intention; and the intention of a group and of individual members within a group.

Intentions that can be defined as collective do not mean they are shared as intentional. Sharing an intention implies that individuals are seen as participants in a group effort that perceives the structural intention and differentiates the shared intention according to the types and levels described, since it does not depend on the intentions of individuals, understood as internal mental states. This is a structural interpretation that proposes the intention to destroy, that is, the characteristic of a structural context of individuals acting within the framework of the intention of structural existence.

Some individuals act within a context that shares this intention, as does the existence of an intention to destroy and of genocide that does not depend on whether they do so or not. This is a category of total collective intention that cannot be reduced to the intentions of individual group members, thus filling a void

because the group acts according to its intentions. States also have the capacity to act and can act according to intentions that are indirected through various individuals who play roles within a structural state.

The difference between this category and the collective intention of a conception of structural intention appreciates the collective aspects of genocide while maintaining an individual interpretation. Collective intention authentically involves attributing intention to a group of individuals. This context puts groups comfortable in conceiving the mental state of an organic entity. It is necessary to view the intention, which refers not to mental states but to the interiors of individuals, as a reference to goals that are recognizable to structures independently of the mentality of each organic individual.

Structures reflect mental states that do not think but feel, desire, and patterns of relationships that constitute orientations toward a particular goal called intention. As an understanding of intention that is in tune with a position that suggests the intention of a reality separable from the action and that has not had a mental state and/or other (Donnelly-Lazarov, 2017) that conflicts with the intentions attributed to one's actions, shift intentions in mental states to a world of objective evidence for one's actions.

Structural intention is comparable to individual intention and attributes in an objective and observable way the structures that

are the product of accumulated actions. Thus, the view of individual intention that makes use of its own proposal is embraced. Intention as a mental state of individuals does not preclude the objective of a relational and social model of a structural context.

A support proposed by the text

The interpretation of the intent to destroy is an attribution to the structural context. Article II of the Genocide Convention formulates it passively. It defines it as the intent followed by acts committed with the intent to destroy, in whole and/or in part, a national, racial, religious, or ethnic group as such. This definition does not provide a precise argument for the intent to destroy.

The presence of a subject also means the activity of a subject in describing the intent to destroy, that is, the product of cumulative acts that reasonably consider the objectives of the convention, which interprets the intent to destroy as an individual's internal state of mind.[71]

The drafters of the Genocide Convention considered the individual understanding of genocide through the preparatory work, which revealed the concerns and individual and subjective interpretations of the intent to destroy, with the opportunity to

71United Nations, Framework of Analysis for Atrocity Crimes: A Tool for Prevention 19 (2014).

include a requirement for premeditation.[72] It was the Yugoslav delegate who expressed concern regarding the possibility of making repression depending on a subjective, rather than merely objective, a psychological condition of a criminal act. This position was permissible in cases of genocide that have remained unpunished.

The Russian delegate expressed concern similar to the position of general intent, creating the risk of ambiguity permitted by perpetrators of genocide who effectively and culpably assert genocide. The British delegate was guilty of using the pretext of failing to advance the motivations contained within a proposed list. These concerns did not constitute decisive evidence for individual interpretation of genocide, but they complicated the efforts of the drafters, who unequivocally embraced them, to assert their case.

A list includes widespread, systematic, and discriminatory practices against the freedom, physical, and moral integrity of a protected group; reproductive rights that alienate children from a group; and public expressions that have taken control of a protected group and its very existence. It also includes structures of a repressive nature that are part of the targeted, gradual elimination of members of a protected group, including those involved in and leading the destruction of the group. A

72Travaux Prèparatoires, op. cit., parr. 1376-1419.

widespread, systematic destruction against a protected group reveals the intention to cause humiliation, fear, terror, and fragmentation to it. It also changes its identity and prohibits, under international law, the use of prohibited weapons against a group.

This is a form of support for repressive ideological structures aimed at destroying a group. It is unlikely that repressive structures are devoid of any ideological framework aimed at destroying a group as such. The situation regarding the Rohingya as an ethnic group prevails among Myanmar's Muslims and provides a useful example of repressive ideological structures that develop over time (Simon Skjodt Center for Prevention Genocide, 2015; Lowenstein, 2015; Green, 2015).

After the government's 1982 Citizenship Act, which prioritized members of certain national races, excluded the Rohingya from the list of national races, a campaign was launched claiming that nothing existed for the Rohingya in Myanmar.[73]

After the end of the repression of the popular uprising, the authorities began a campaign to distribute new national identity cards to replace the cards and national registration held by Myanmar citizens at that time.

73Human Rights Council, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar of its Thirty-Ninth Session, U.N. Doc. A/HRC/39/CRP.2, par. 479 (2018).

In small Rohingya villages, security personnel confiscated old cards without issuing new ones. The authorities imposed regulations against the Rohingya starting in the 1990s, requiring permission to marry and limiting each family to two children.[74]

After a massacre of violence against the Rohingya in 2016-2017, security forces were present in the areas where the Rohingya lived and were engaged in land reclamation operations that involved the burning of entire villages, mass rapes, torture, killings, etc.

Sexual violence was perpetrated in a humiliating manner and small children were tortured and killed (Hassan, Smith, 2012; Amnesty International, 2016; Green, MacManus, De la Cour Venning, 2018). It is obvious that the exact number of people estimated has not been calculated well, especially for those who escaped to Bangladesh.

The ongoing eviction operations were massive, as were the demonstrations under Yangon's orders in various locations across the country (Voa News, 2017). The ongoing persecution includes ideological and repressive indicators of a structural genocidal context. Genocidal structures accumulated and intensified over time.

74Fortify Rights, Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar 24 (2014): https://www.fortifyrights.org/mya-inv-rep-2014-02-25/ Accessed on 24.09.2025.

In the dispute between Gambia and Myanmar, third-party states intervened, excluding them from the main dispute. The weakening of the evidentiary standard made it difficult for Gambia to prove the crime of genocide on the merits. The elements of the case, admittedly, pose problems of interpretation.

Myanmar's defense was based on denying the existence of material facts brought from Gambia at the time of the characterization of genocide acts. Thus, it was admitted that the crimes were committed in Rakhine territory against ethnic subjects who were part of the Rohingya, and that these acts did not constitute a crime of genocide. We cannot exclude that the Rohingya were an ethnic group in self-defense, regardless of their nationality and/or statelessness and failure to be included in the list of ethnic groups.

The ICJ sought to protect this group, as also happened in the Akayesu case from the ICTR (Clark, 2012).[75] The same position was also noted by the ICTY,[76] which specified the relative conduct of membership of the victim and the protected group in

75ICTR, Prosecutor v. Alfred Musema. Judgment and Sentence, TC, ICTR-96-13-A, 27 January 2000, par. 206. In jurisprudence see also: ICTY, Prosecutor v. Dražen Erdemović, Separate and Dissenting Opinion of Judge Li, AC, IT-96-22-A, 7 October 1997, par. 19. ICTY, Prosecutor v. Duško Tadić, Separate Opinion of Judge Robinson, TC, IT-94-1-Tbis-R117, 11 November 1999, 2. 9. ICTY, Prosecutor v. Duško Tadić, Separate Opinion of Judge Shahabuddeen, AC, IT-94-1-A e IT-94-1-A bis, 26 January 2000, 41ss.

76ICTY, Prosecutor v. Goran Jelisić, Partial Dissenting Opinion of Judge Wald, AC, IT-95-10-A, 5 July 2001, par. 13.

the absence of a real membership (Marxsen, 2018).[77] Undoubtedly, the jurisprudence has attempted to characterise in a synthetic manner a precautionary ruling that implied the qualification of the Rohingya as a protected group according to the convention.

What was difficult to prove was the *dolus specialis* given the definition of the ongoing genocide that was occurring in the Rakhine area and the application of the Convention on the Prevention and Punishment of the Crime of Genocide that the court established the relevant stringent parameters to ascertain this element (Steinfeld, 2015; Nargas, 2018).[78] The prospect of humanizing international law as a bending of the standard in the merits phase seems plausible to what actually happens.

The provisional measures adopted by the court are deemed effective (Milanović, 2011; Milanovic, 2016) and have highlighted Myanmar's call to respect its international obligations and to draw the international community's attention to serious situations requiring protection, especially in terms

77ICTY, Prosecutor v. Milorad Krnojelac, Judgment, AC, IT-97-25-A, 17 September 2003, par. 474. ICTY, Prosecutor v. Radoslav Brđanin, Trial Judgment, TC-II, IT-99-36-T, 1 September 2004, par. 1087, par. 540. ICTY, Prosecutor v. Naletilić and Martinović, Trial Judgment, TC, IT-98-34-T, 31 March 2003, par. 670. ICTY, Prosecutor v. Prlić et al., Trial Judgment, TC-III, IT-04-74-T, 29 May 2013, par. 55. Against this approach, see: ICTY, Prosecutor v. Milomir Stakić, Trial Judgment, TC-II, IT-97-24-T, 31 July 2003, par. 679.

78Application of the convention for the prevention and repression of the crime of genocide (Bosnia Herzegovina v. Yugoslavia), preliminary exceptions, sentence of 11 July 1996, in ICJ Reports, par. 595. ICJ, Jadhav case (India v. Pakistan), ordinance on precautionary measures of 18 May 2017, ICJ Reports, 2017, p. 244, par. 53ss.

such as genocide, established by the ICJ.

The measures adopted are considered effective only in the continuation of unanswered events and for states that demonstrate support for the appeal of Gambia and the Security Council, the General Assembly, and the Secretary General, who intervene within the framework of their respective competences based on the UN charter, seeking to oversee the implementation of measures that were established to prevent the situation from worsening.

The reservation made by Myanmar under Article VIII of the Convention does not preclude UN bodies from intervening proprio motu.

How to prevent and punish genocide? State, international processes and structural interpretation

The consistent definition of genocide is adopted by states seeking to prevent this crime, primarily by a super partes court, such as the ICJ, which hears interstate disputes regarding obligations under the Genocide Convention, and the ICC, which hears interstate disputes concerning the trials of individual perpetrators.

Individual mentalities are part of objective structural conditions, such as an approach that minimizes the capacity of actors who hypocritically perpetrate genocide and encourages prevention

and accountability measures to identify those who do not contribute to the dismantling of genocidal structures.

A structural interpretation stems from the power of states that seek to prevent and limit those who seek, avoid, recognize, and engage in such practices. The critical role of genocidal structures is linked to the structural interpretation, which implements a broad, temporal, horizontal prevention strategy. When genocide is conceived individually and as a discrete crime committed by a small number of perpetrators, prevention requires the inability to act against evil genocides.

Genocide is understood as a process that unfolds innumerable ways among individuals who produce genocidal structures over time. Therefore, prevention extends to opportunities to stop the proliferating genocide. Interested states prevent genocide and identify genocidal structures they can support.

Discussions of atrocity prevention are disproportionately based on the obligations of foreign states that intervene in situations of genocide (Bellamy & Dunne, 2016), a pressure that supports states that contribute to it.

The US contributed to the atrocities in East Timor by communicating to Indonesia that it did not oppose invading the country after the Portuguese decolonized it (Sidell, 2019). After the invasion, US officials supported the Indonesian regime despite knowing they were being massacred with American-

made weapons (Hersch, 1992; The Nation, 2017).

Iraqi forces used American chemical weapons against Kurds while the US provided Saddam Hussein with related intelligence and aid. On the other hand, in Myanmar, the US and other states claimed that the Burmese government and military committed atrocities against the Rohingya (Mcelroy, 2013; Mahtani, 2015). The United States acknowledged that the genocide occurred five years after the height of the violence and a decade after the warning signs were evident.

In the case of Rwanda, the US and France mismanaged the genocide and colonial and neocolonial forces created the conditions to exacerbate the atrocities that occurred (Alvarez, 1995; Anghie, Chimni, 2003).

The US provided Israel with financial, political, and weapons support that killed thousands of Palestinian civilians in Gaza (Crowley, Wong, 2024). The states concerned prevented atrocities and also identified the genocidal structures that abstained from their contributions.

Halting contributions and dismantling genocidal structures required state officials to adopt a structural approach that takes measures that recognize and repair historical genocides, including those they contributed to. It is important for the current Western imperialist powers of the North, which (Short, 2016; Stock, 2022) are seen as leading rescue interventions to

save people in the Global South.

Recognizing the genocides committed by the imperialist powers of the North provides a range of cases that seek to draw lessons and strengthen the legitimacy of an international human rights system by indicting hypocrisy and racism. States have exerted pressure on developing states, contributing to genocidal structures in a formal manner, even filing interstate lawsuits at the ICJ. South Africa, Nicaragua, and Sudan have followed this strategy.[79]

States follow the example of frequent and timely lawsuits. States that exert diplomatic pressure to coordinate responses at the UN, regional bodies such as the European Union, Mercosur, ASEAN, etc., grant asylum to those escaping violence and persecution.

The subjective individual mentality, structural and objective conditions, and structural interpretation make it difficult to justify failure to comply with these types of measures. It is easy to affirm and ignore the internal state of mind, thus denying the structures of genocide, especially given the amount of information available on the ways in which genocide is perpetrated.

79Application of Convention on Prevention and Punishment of Crime of Genocide (Gambia v. Myanmar), Provisional Measures, 2020 I.C.J. Report 3 (23 January); see, e.g., Application of Convention on Prevention and Punishment of Crime of Genocide in Gaza Strip (South Africa v. Israel), Provisional Measures, 2024 I.C.J. Report 6 (26 January).

For other states, the adoption of measures counteracts the structures of genocide without commenting on the motivations of the individuals who contribute and increase the reputational cost of the states that follow this example (Fang, 2008; Scharf, 2009; Chilton, 2014; Brutger, Kertzer, 2018; Morse, Pratt, 2022).

Returning to the International Court of Justice

The role of the ICJ in interpreting the Genocide Convention in litigation is a privileged position that clarifies and defines genocide, interpreted structurally. It establishes the question of a situation that constitutes genocide, which does not depend on an individual's internal mental state but requires an analysis to establish the structures aimed at destroying the listed and verified acts. It is clarified that the preventive obligations of states include the obligation not to contribute to structures of genocide within their territory and/or elsewhere.

Defining genocide and its content as provided for by the Convention itself puts the ICJ in the position of using initial requests for provisional measures as an opportunity to identify existing, developing structures of genocide as well as providing precise guidance on prevention.

Since 2020, the ICJ has adopted provisional measures in the Gambia v. Myanmar case highlighting the issue of evidence in

the case of intent to destroy, arguing for its role in determining a plausible right, such as a right to compensation and a determination that does not require proof regarding intent to destroy.[80]

The court's strategy represents and distances itself from the individual approach to the crime of genocide, given that provisional measures are not based on evidence of an individual's internal mental state. Dismissal is decided on the basis of an individual approach and does not circumvent the issue of intent to destroy, which determines whether there is sufficient evidence for genocidal structures.

The ICJ articulates specific measures that the state adopts for genocidal structures to prevent the occurrence of genocidal acts. Provisional measures are approved by the Court and are general, limited to reaffirming states' obligations under the Convention.[81]

The ICJ has ordered Myanmar to adopt measures of power to prevent further commission of the enumerated acts and to guarantee its armed forces, like any irregular armed unit that does not commit the enumerated acts, to preserve evidence and to submit periodic reports to the Court.[82]

Provisional measures are incisive, identifiable by specific laws that abolish and interrupt military units to be dismantled. The

80Gambia v. Myanmar, 2020 I.C.J. Report, 3.

81Bosnia & Herzegovina v. Serbia & Montenegro, 2007 I.C.J. Report, par. 431; Croatia v. Serbia, 2015 I.C.J. Report, par. 428.

82Gambia v. Myanmar, 2020 I.C.J. Report 3.

ICJ has begun issuing bold provisional measures. Reference is made to the Ukraine v. Russia case, where the Court suspended military operations launched on 24 February 2022 in the territory of Ukraine.[83]

In the South Africa v. Israel's operations in Gaza the ICJ prompted to deny the South African side's request for a similar order, which included specific measures regarding the incitement of services based on necessary living conditions and humanitarian assistance, thus addressing the Palestinian situation and ordering a limited suspension of military activities in relation to Israel's military offensive against Rafah.[84]

The ICJ adopted a structural approach that continued to provide, through the orders, a means of dismantling genocidal structures and preventing genocidal acts. The likelihood of provisional measures and judgments has a huge impact, given that the ICJ has expedited the trials of states involved in genocide cases. The structural interpretation makes this task easier for the court, given that evidence of genocidal structures is available and

83Allegations of Genocide Under Convention on Prevention and Punishment of Crime of Genocide (Ukriane v. Russia), Provisional Measures, 2022 I.C.J. Reports 211 (16 March).

84Application of Convention on Prevention and Punishment of Crime of Genocide in Gaza Strip (South Africa v. Israel), Provisional Measures, 2024 I.C.J. Rep. 6 (26 January); Application of Convention on Prevention and Punishment of Crime of Genocide in Gaza Strip (South Africa v. Israel), Request for Modification of 26 Jan. 2024 Provisional Measures, 2024 I.C.J. 192, parr. 45-47 (28 Mar.); Application of Convention on Prevention and Punishment of Crime of Genocide in Gaza Strip (South Africa v. Israel), Request for Modification of 28 Mar. Provisional Measures, 2024 I.C.J. 192, parr. 50–53 (24 May).

respects evidence of individuals' internal mental states.

The ICJ delays a final ruling in criminal cases that have not established the guilt of individual perpetrators. The ICJ has limited itself to issuing provisional measures in genocide cases through various means when states have initiated the relevant proceedings.

The ICJ lacks independent means to enforce its rulings. ICJ provisional measures and rulings are binding on the parties (Dahl-Eriksen, 2019; Smith, 2023). ICJ rulings have contributed to and increased reputational costs for states that fail to recognize and address the crime of genocide (Hongju Koh, 1997; Downs & Jones, 2002; Guzman, 2008; Scharf, 2009; Brutger & Kertzer, 2018; Mercer, 2018).

International criminal courts

An important and precise role after the ICJ is played by international criminal tribunals, which have developed the definition of genocide by consolidating a specific interpretation of the intent to destroy.

The ICC has not yet tried a separate case of genocide with sufficient precision to provide a precise definition of genocide. The specific interpretation followed by the ICTR and ICTY demonstrates the reasoning for considering the intent to destroy structurally. The structural approach simplifies the efforts of the

ICJ and the courts to secure criminal accountability for the perpetrators of genocide.

The ICJ thus carefully distinguishes the ongoing genocide argument from the question of whether individuals are guilty of and have committed acts of genocide.

The ICJ has issued a decision on genocide that involves a structural context and a single defendant. It also adopted a decision regarding a structural context, establishing that a genocidal structural context exists, and a better position is taken, granting the prosecutor's requests to institute provisional measures and issue an arrest warrant for ongoing atrocities. Through the trial, the parties focus less on the issue of circumstantial evidence of intent to destroy and can also indict other defendants who focus on the issue of having committed acts of genocide.

The parties rely on the fact that the defendant directly committed an act that meets the requirements of one of the crimes derived from the ICC Statute of Rome.

Distinguishing between genocide and acts of genocide helps clarify the difference between these types of crimes, along a line that is blurred by the judgments issued by *ad hoc* courts.

Attempting to commit an act of genocide does not definitively mean that it includes everything related to the crime of genocide. Aiding and abetting genocide, the commission of

genocide in a particular way, does not mean that it is a general act of genocide.[85]

The ICC has highlighted that each defendant included the required *mens rea* in his or her attitude. It requires that the defendant attempted to "respond" to the intent to destroy, and therefore the court asked whether he or she committed the act(s) and whether the accused had the intent to destroy, as a predefined mental element according to Art. 30 of the ICC Statute (Ambos, 2022).

Awareness of an attitude arises from circumstances of the acts that differ. All share what is part of the definition, which includes the intent to destroy. Independently of specific acts by the accused, ad hoc courts establish that the accused is aware of a structural context that characterizes the intent to destroy.

The intent to destroy is interpreted as a contextual element similar to the requirement of a widespread, systematic attack within the scope of crimes against humanity (Vest, 2007; Kim, 2016).[86]

85The Genocide Convention lists some several offenses: "(…) conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; complicity in genocide (..)". See also Art. II of the Genocide Convention: "(…) Rome Statute does not repeat the same list, specifies other acts that incur individual criminal liability (…) orders, solicits or induces," "aids, abets or otherwise assists," or "attempts" the commission of any of the crimes in its jurisdiction. Rome Statute (…) art. 25(b)-(c) (...)".

86Vest affirmed that: "(...) genocide provision makes no explicit reference to a contextual element, such element is inherent to its *mens rea* where it has been incorporated in the extended subjective element of destroying a protected group in whole or in part (…)".

Criminal courts have developed a jurisprudence that thus implicitly elaborates the evidence of a contextual element that includes the connection between the accused's act and the contextual element.[87]

The connection of crimes against humanity has to do with the awareness of an attack by a civilian population that only the act is part of the attack. This approach is likely to have a similar practical effect with different criminal proceedings.

Genocide extends to all those who do not have a specific intention to commit genocide but who commit acts of genocide, understanding the destructive consequences of their actions and the survival of the group of victims in question. This technique recognizes traditional interpretations of intent. This approach is based on the understanding of the intent to destroy as the *mens rea* of a crime, which embraces the individual interpretation of genocide as the act of a single perpetrator.

The interpretation of the intent to destroy is distinct from the structural interpretation and similar to the objectives of criminal prosecution. The criteria for understanding the destructive consequences relate to the intent to participate, at a level different from the intent to destroy, and the *mens rea* of genocide as a singular plan understood within the structural context. This plan is interpreted in a variety of ways due to the

87Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, par. 418 (ICTY, 22 February 2001).

practical differences in respecting minimal criminal proceedings.

The structural interpretation supports other efforts related to reparation and transitional justice. It draws attention to the structures that enable genocide, such as states' contributions to the development of genocidal structures and missed opportunities to prevent harm. This attention helps to expand accountability, which goes beyond individuals and activities that justify criminal charges to include actors who contribute to a general context that also includes international actors.

Any attempt of identification means creating systems of accountability that investigate the role of international actors who perpetrated, promoted, and aggravated the situation (Mutua, 1997).[88] This type of accountability process does not focus on punishment but alternately considers the promotion of understanding that paves the way for reparation.

Some possible objections and negative scenarios

There are many negative positions and possible objections, given that it is difficult to define genocide in a multifaceted manner. It is unfair for the accused to interpret and overturn established law without providing a sufficiently precise standard

88Mutua affirmed that: "(...) criminal tribunals for Rwanda and Yugoslavia "only make sense in the context of an overall solution, a comprehensive and bold settlement addressing the foundational problems that unleashed the genocides in the first place (…)".

of trust, which is unjustified by the influence of international law and the behavior of states.

A first criticism could be the structural interpretation and definition of genocide without including the status of the crime of crimes. This involves an overemphasis on the criteria of intent, which excessively emphasizes the number of situations that qualify a genocide. A structural interpretation opens the possibility of defining genocide using objective criteria and investigations into the subjective mindset of individuals, an approach that makes it difficult for states to evaluate the biased and/or hypocritical intentions of perpetrators.

Reducing subjectivity helps in the opposite direction. It thus hinders decisions regarding the motivational interpretation of structural conditions that do not indicate what is meant by the intent to destroy. This variant concerns the question of expansiveness for crimes against humanity and/or war crimes.

An alleged genocide thus involves war crimes and crimes against humanity, and an excessive focus on genocide allows us to gain the impression that such atrocities are insignificant. Such genocidal situations identify war crimes and crimes against humanity, which are not mutually exclusive. Genocide appears to include members of victim groups who, for political reasons (Greenawalt, 1999; Schabas, 2006), are not party to a treaty assigned to states, i.e., to prevention obligations and categories

of international crimes such as the Genocide Convention (Human Rights Watch, 2022).

Other international crimes benefit from a structural approach, and the *mens rea* requirements, while other international crimes are not stringent for genocide, can be quickly recognized and committed using a structural approach that helps the relevant actors identify dangerous structures before the atrocities begin.

Another "negative" and critical factor concerns the principle of fairness for a fair trial of defendants, a corollary of every criminal trial and the basis of a structural interpretation that hinders the prosecution of individuals guilty of genocide.

One response is the structural approach, which decentralizes the prosecution of individual defendants as the primary means of addressing genocide. It thus focuses on identifying the genocidal structures that arise from the obligation of states to respond.

The structural approach protects defendants in an unjust manner that condemns genocide. It requires the defendant to prove that he or she committed the listed acts, such as killing, causing serious harm, bodily injury, etc., within a genocidal structural context, and that he or she is aware of the intent.

Knowing the intent means that the defendant knowingly committed a criminal act, thus manifesting the intent to destroy. The defense of coercion is available as a response to threats to one's life and can disprove guilt. This is a demanding standard

of a knowledge-based approach that favors the standards of criminal courts, which in practice requires defendants to have constructive knowledge of the intent attributed to a defendant, i.e., high-level circumstantial evidence. This eliminates the need for an individual defendant to harbor the intent to destroy and to provide the courts with documents committed by defendants and defense counsel that they can dispose of.

Another objection could be the structural approach that relates to the text of the Genocide Convention, thus supporting the intent to destroy as a requirement for genocide. The text is varied and often difficult to interpret, and broad, and clearly and precisely distinguishes the collective process of genocide, the states responsible for individual acts of genocide, and the individual perpetrators. It is difficult for the Convention and the states to modify the necessary political will, which makes it open to various interpretations.

In particular, Article II of the Convention specifies that the intent to destroy is a mental element for a crime pertaining to an individual. The intent to destroy refers to the structural context, which is verified through acts consistent with a text that includes a single perpetrator in its definition. Interpreting the intent to destroy as a *mens rea* of an individual results in every commission of genocide. The difficulty is evident in the definition, as genocide is one of the acts included in the text of

Article II of the Convention, and the intent is defined in the introduction.

Genocide is an act that is part of the common language referred to as genocide and consists of a complex of thousands of criminal behaviors that constitute genocide. The intent to destroy is described as a structural context, an internal state of mind for an individual as the object of an objective related to the Genocide Convention.

Individual interpretation prevails over the Convention's prevention objective, making it easy for States Parties to the Convention to justify their failure to recognize and intervene in genocide based on uncertainty and adherence to their own definition.

Criminal jurisprudence does not contribute a punitive objective, and precisely forces drafters to an individual conception of genocide as a history that reveals those who decided on the final wording of the Convention and the understanding of terms consistent with the definition of a restrictive interpretation. The fear surrounding internal mental states, such as intentional behavior, premeditation, various other motivations, and so on, hinders the determination of responsibility for genocide. We cannot say that this is conclusive evidence for the structural approach, even though it was proposed by the previous drafters of the Genocide Convention, thus suggesting an ambiguous

wording for those who prefer an individual approach and those who wish to believe in this interpretative approximation.

Consolidated law

The structural interpretation of the intent to destroy is linked to consolidated law for those who support the definition of genocide. The concern is legitimate in a situation that is out of place and respects areas of law such as recent jurisprudence on genocide. This individual conception is adopted by international criminal courts in relation to certain situations in Rwanda,[89] in the former Yugoslavia,[90] and the role of the ICJ in genocide verdicts for cases in the former Yugoslavia.[91] These cases concerned Myanmar, Ukraine, Palestine, and Sudan, which are undecided and do not have the opportunity for further interpretation, definition, as well as correct misconceptions.

It seems unlikely that a structural approach's advantage is to allow for discretion regarding the existence of an intention to destroy, which is based on objective characteristics of structural conditions and on individuals' internal mental states. The structural approach does not provide a precise rule and leaves room for decision-makers to express differing opinions on the

89Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement (2 September 1998).

90 Prosecutor v. Krstić, Case No. IT-98-33-A, Judgement (ICTY, 19 April 2004).

91Bosnia & Herzegovina v. Serbia & Montenegro, 2007 I.C.J. Rep. 43; Croatia v. Serbia, 2015 I.C.J. Report 3.

situation that constitutes genocide.

The meaning of complete and/or partial destruction does not allow the structural approach to fully resolve the situation. Decision-makers' discretion within the framework of a structural approach is limited to prevailing interpretations of the definition of genocide.

The possibility for states to reject accusations of genocide based on insufficient evidence and the mindset of individual perpetrators is eliminated. Structural conditions are easily identified, and any type of discrimination is sufficient, widespread, and systematic to indicate an intent to destroy.

Discriminatory practices and security forces perpetrated the killings and the courts consider structural conditions as circumstantial evidence which in a varied way use a structural approach that identifies such conditions of genocide and various other types of interpretations.

Another final objection concerns the legal interpretations associated with the Genocide Convention, which are irrelevant to states. A realistic objection rejects the premise of insisting on the definitional problem. Definitional issues are resolved, and states are freed to address genocide, as has been asserted, even by consciously committing events that constituted crimes of genocide and are not legally, politically, or morally, obligated to do so and stop such situations.

Answers require significant evidence for genocide, which affects the perceived national interests of states after Russia's attacks in Ukraine and the genocide (Lee, Lederman, Kube, 2022; Liptak, 2022; Pager, 2022), as a claim that is controversial given Russia's expansionist ambitions at the time. National interests for states influence responses to genocide, which are different from the assertion and legal definitions that have a significant effect on the behavior of states.

American officials (Gutbrod, Wood, 2021; Nebehay, 2021) have adopted a policy of avoiding describing only the atrocities against the Kurds in Iraq, Bosnian Muslims in Yugoslavia, the Rohingha, and the Tutsi in Rwanda as crimes of genocide. Their refusal was based on fears of prevention obligations under the Genocide Convention.

The US administration, from Bush and after, was hostile to doing anything about such crimes, and especially the position we saw in Darfur, which failed to act in accordance with the international community's stance—that is, to adopt immediate and rigorous measures to respond to evolving atrocities, despite the ICC already being an active court capable of punishing such crimes (Hamilton, 2011a).

International human rights law and alleged violations influenced the behavior of states (Hamilton, 2011b) through effects on the international public, which certainly influenced the domestic

one. The term genocide was now the only power to create public pressure (Fang, 2008; Brutger, Kertzer, 2018; Mercer, 2018; Morse, Pratt, 2022) in accordance with the obligations of the Genocide Convention, and incurring obvious and imposed legal, political costs for the courts and bodies of the UN.

Costs that were excluded from the genocide prevention budget for some states in certain situations. Situations in which states and international organizations identified the structures of genocide, thus avoiding exerting pressure on interested parties. Thus, the excuse of insufficient evidence and the individual's mental state, which relied on objective arguments and indications, was eliminated. State costs for genocide prevention were significant, but were not imposed in practice.

Judges unconsciously treat political concerns as rationales. Judges act according to the principles of imprecise, ineffective, and inconsistent implementation of the Genocide Convention. The structural approach to the crime of genocide calls for an interpretation of key terms and a redefinition of the Genocide Convention. This approach focuses on one of the key terms in the mindset of individuals, indicators of the objective nature of structural conditions.

Such a change encounters resistance from the maintenance of the *status quo*. Thus, the *modus operandi* is assured that genocide actually occurs and that it is based on a plausible,

ambiguous interpretation that offers a path to serve the objectives of the Convention while respecting individual interpretation as much as possible.

Conclusion

From an investigation into the crime of genocide, following Ukraine and Israel, we learned that prosecuting for genocide has enormous political, economic, moral, and, above all, legal value. The victims are always numerous, and their descendants hold out the hope of ending the violence through recognition and reparation.

Perpetrators and supporters fear condemnation, the costs, and the risk of military and economic coercion, as well as a designation encompassed by the crime itself. Discussions on genocide reflect conflictual differences between parties opposed to one another because of their own interests. This creates a profound confusion about preventable genocide. This confusion hinders the achievement of the goals of the Genocide Convention and the possibility of prevention and punishment. It also achieves the goals of the Genocide Convention by proposing the replacement of the prevailing individual interpretation of genocide with a structural interpretation that conceives of genocide as a collective process made possible by structural conditions.

Crimes in connection with genocide have a collective character and imply a structural context thus making it difficult to identify the internal mental states of individuals.

The structural system of crimes facilitates prevention, which reduces prosecution and punishment. The ongoing injustices of state actors benefit from a structural approach, placing genocide under a different approach to clearly achieving the prevention and punishment goals of the Genocide Convention.

Prevention opportunities are wasted, and the legitimacy of ongoing punishment efforts calls into question the inconsistent jurisprudence developed by *ad hoc* criminal courts. The adoption of the Genocide Convention and the role of the ICC and ICJ, which continuously receive applications for genocide crimes, are timely challenges for the coming years to reject the failure of an individual approach and to adopt a structural one.

The reasoning, objections, constantly contested positions, and objectives of the Convention are not achieved through a misunderstanding of the terms, which must necessarily be the basis for imperfect justice, without ever satisfying victims globally (Ferstman, Goetz, 2010; Liakopoulos, 2024c).

It is clear that even in the case of the crime of genocide, international criminal law is an instrument *par excellence*, a retributive paradigm for criminal justice as a unique, effective response to the commission of crimes on a diverse scale, often

unprovable for this type of crime, leaving room for continued impunity.

The retributive paradigm embraces, in a reconciliatory and restorative manner, every type of alternative to criminal law as a complementary tool. Effective paradigms for addressing the past are the subject of brief reflections, and the topic, which does not lend itself to any type of conclusion or definition, delves into the problem of an often political nature, as is most often the case with the crime of genocide and the endless search for acceptable compromises (Azzolini Biancaz, 2018).

The choice in favor of an instrument like international criminal justice often tends to appear inhumane and to cause suffering, while simultaneously scrupulously respecting substantive and procedural principles that prevent it from becoming a means of revenge, of justice for the victors and the strongest (Minear, 2016).

An international law rigorously grounded in a careful reflection on the institution of a concurrence of norms connects the pillars on which contemporary criminal law rests, even at the international level: that is, an unlawful act, the personality of the perpetrator, and the criminal consequences of the crimes committed (Goldman, 2016).

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